
Federal Communications Commission

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

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Pacnet Incorporated
San Diego (Otay), California

File Number: EB-05-SD-043

NAL/Acct. No: 200532940010

FRN: 0012-5042-13

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: September 28, 2005

By the District Director, San Diego Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Pacnet Incorporated ("Pacnet"), an operator of a microwave radio station in the Otay Mesa area of San Diego, California, apparently willfully and repeatedly violated Section 301 of the Communications Act of 1934, as amended ("Act"),¹ by operating an unlicensed microwave radio station on microwave channel 22775.0 MHz.² We conclude, pursuant to Section 503(b) of the Act,³ that Pacnet is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. On December 12, 2004, an agent from the Commission's San Diego Office was investigating allegations that companies in the Otay Mesa area of San Diego were using unauthorized microwave radio stations to communicate with sister companies across the U.S. – Mexico border in Tijuana, Mexico. The agent monitored and measured the transmissions of a microwave radio station operated at an unattended microwave radio site, leased by Pacnet Incorporated, at 8675 Avenida Costa Norte – Suite A, San Diego, California. The agent found that this microwave radio station was operating on microwave channel 22775.0 MHz.

3. Another San Diego agent returned to the Pacnet site on February 4, 2005, and measured the microwave radio station operating on microwave channel 22775.0 MHz. An inspection was attempted, but no one was available to make the station available to the agent at that time.

¹47 U.S.C. § 301.

²See 47 C.F.R. § 101.147(s).

³47 U.S.C. § 503(b).

4. On February 25, 2005, San Diego agents returned to the Pacnet site and conducted an inspection of the radio station. A consulting engineer for Pacnet located in Tijuana, Mexico was contacted by the agents and this engineer provided additional information concerning the Pacnet station. The engineer told the agents that the station had been conducting tests for the past week. The agent requested a copy of Pacnet's station authorization for its microwave radio station, but none could be produced.

5. A review of the Commission's database revealed that Pacnet has no authorization to operate a point-to-point microwave radio station at 8675 Avenida Costa Norte. However, an application for license and a request for special temporary authority were filed by Pacnet on February 28, 2005, for the frequency 22475.0 MHz, operating from 8675 Avenida Costa Norte, San Diego, California.⁴

6. A San Diego agent returned to the Pacnet site on March 3, 2005, and measured the microwave radio station operating on microwave channel 22775.0 MHz. Another inspection was attempted, but no one was available to make the station available to the agent at that time.

7. On March 11, 2005, the San Diego Office sent a Letter of Inquiry ("LOI") to Pacnet concerning its authority to operate on 22776.4 MHz.⁵ The San Diego Office received a reply to the LOI on June 10, 2005. In its reply, Pacnet states that the radio equipment was purchased from a Mexican court which was auctioning the equipment of a company that had gone out of business. Pacnet stated it did not know of any FCC licenses held by that company. Pacnet further stated that it constructed the microwave station temporarily for "...testing and alignment purposes and verification and setting of frequencies." Pacnet also stated that it will not operate, other than for test purposes, until it receives an FCC license.

8. On March 23, 2005, a San Diego agent attempted to measure the microwave transmitter at the Pacnet site and the unit found was not operational. However, on August 9, 2005, a San Diego agent again measured the microwave station operating on microwave channel 22775.0 MHz at the Pacnet site.

III. DISCUSSION

9. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. The term "willful" as used in Section 503(b) of the Act has been interpreted to mean simply that the acts or omissions are committed knowingly.⁶ The term "repeated" means

⁴See File Nos. 0002060640 (license application) and 000206644 (STA), filed February 28, 2005. A modification to the license application was filed by Pacnet on June 2, 2005, to change the requested microwave frequency to 22075.0 MHz. According to Commission records, the STA request was returned on June 1, 2005 and the modified license application was returned on August 23, 2005.

⁵22776.4 MHz is within the maximum allowable tolerance of microwave channel 22775.0 MHz. See 47 C.F.R. § 101.147(s).

⁶Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

the commission or omission of such act more than once or for more than one day.⁷

10. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy of communications or signals by radio within the United States except under and in accordance with the Act and with a license. On December 12, 2004, February 4, 2005, and March 3, 2005, measurements made by San Diego agents revealed that Pacnet was operating a microwave radio station on microwave channel 22775.0 MHz. A review of Commission records indicated that Pacnet had no authorization to operate on 22775.0 MHz. The review also indicated that Pacnet has a pending application, but no authorization, to operate on 22475.0 MHz. On June 10, 2005, Pacnet acknowledged operating a microwave station on microwave channel 22775.0 MHz and acknowledged that it had no license, only a pending application, to operate such a station.⁸

11. Although Pacnet stated that its operation was for “testing purposes,” our inspection reveals that Pacnet’s operation had been continuing for at least 90 days and resumed in August 2005. Pacnet was aware licensing for its station was required, as evidenced by its license application and its response to the LOI. Therefore, Pacnet’s violation was willful. The violation occurred on more than one day, therefore, it was repeated. Based on the evidence before us, we find that Pacnet apparently willfully and repeatedly violated Section 301 of the Act by operating a microwave radio station without authorization.

12. Pacnet does not appear to have a license to operate the microwave station in question, however, Pacnet apparently continues to operate the station. We will therefore direct Pacnet to file a report with the District Director of the San Diego Office detailing whether Pacnet is continuing to operate the microwave station described in this NAL and pursuant to what authority.

13. Pursuant to *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* (“*Forfeiture Policy Statement*”), and Section 1.80 of the Rules, the base forfeiture amount for operation without an instrument of authorization for the service is \$10,000.⁹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require.¹⁰ Applying the *Forfeiture Policy Statement*, Section 1.80, and the statutory factors, we conclude that Pacnet is apparently liable for a forfeiture in the amount of \$10,000.

⁷Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”

⁸Pursuant to Sections 101.31(b)(1) and 101.31 (b)(1)(v) of the Rules, 47 C.F.R. §§ 101.31(b)(1), 101.31(b)(1)(v), certain applicants for point-to-point microwave stations, not located within 56.3 kilometers of any international border, operating in certain frequency bands, are deemed to have conditional authority to operate their proposed stations during the pendency of their applications. The frequencies proposed for use by Pacnet in its applications are not contained in these frequency bands. Also, Pacnet’s proposed station is located approximately 1.06 km from the Mexican border.

⁹12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁰47 U.S.C. § 503(b)(2)(D).

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's Rules, Pacnet Incorporated is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violation of Section 301 of the Act.¹¹

15. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture, Pacnet Incorporated **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

16. **IT IS FURTHER ORDERED** that Pacnet Incorporated **SHALL FILE**, within thirty (30) days of the release of this NAL, a report with the District Director, San Diego Office, detailing whether Pacnet is continuing to operate the microwave station described in this NAL and pursuant to what authority.

17. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

18. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, San Diego Office, 4542 Ruffner Street, Suite 370, San Diego, California 92111, within thirty (30) days from the release date of this Notice of Apparent Liability for Forfeiture and must include the NAL/Acct. No. referenced in the caption.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

20. Requests for payment of the full amount of this Notice of Apparent Liability for Forfeiture under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹²

¹¹47 U.S.C. §§ 301, 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80.

¹²See 47 C.F.R. § 1.1914.

21. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Pacnet Incorporated at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

William R. Zears, Jr.
District Director
San Diego Office
Western Region
Enforcement Bureau